

IN THE SUPREME COURT OF TENNESSEE

SPECIAL WORKERS' COMPENSATION APPEALS PANEL

AT NASHVILLE  
(June 9, 1997 Session)

**FILED**  
**August 28, 1997**  
**Cecil W. Crowson**  
**Appellate Court Clerk**

CAMILLE GAINES,	)	DAVIDSON CIRCUIT
	)	
Plaintiff-Appellee,	)	Hon. Thomas W. Brothers,
	)	Judge.
v.	)	
	)	No. 01S01-9701-CV-00015
AMERICAN AIRLINES, INC.,	)	
	)	
Defendant-Appellant.	)	

For Appellant:

For Appellee:

Jonathan Cole  
Baker, Donelson, Bearman  
& Caldwell  
Nashville, Tennessee

William B. Jakes, III  
Howell & Fisher  
Nashville, Tennessee

MEMORANDUM OPINION

Members of Panel:

Adolpho A. Birch, Jr., Chief Justice, Supreme Court  
Robert S. Brandt, Senior Judge  
Joe C. Loser, Jr., Special Judge

AFFIRMED AS MODIFIED

Loser, Judge

MEMORANDUM OPINION

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tenn. Code Ann. section 50-6-225(e)(3) for hearing and reporting of findings of fact and conclusions of law. In this appeal, the employer contends (1) the trial court erred in calculating the claimant's average weekly wage, (2) the trial court erred in awarding permanent partial disability benefits in excess of two and one-half times her medical impairment rating and (3) the trial court erred in awarding benefits for hypertension. The employee contends (4) the trial court erred in allowing the employer credit for certain temporary total disability benefits and (5) the appeal is frivolous. As discussed below, the panel has concluded the judgment should be modified as to the claimant's average weekly wage, but otherwise affirmed.

The employee or claimant, Gaines, worked as a flight attendant for American Eagle, the employer. On September 13, 1993, she injured her back and neck when, as she was performing her duties on a flight from Nashville to Asheville, North Carolina, the aircraft encountered extreme turbulence. She was thrown about in the cabin, causing the injuries. After receiving medical care and a period of recuperation she returned to work but later quit because her residual disability rendered her unable to perform her work without disabling pain.

After a trial on the merits, the trial court found the employee's average weekly wage to be \$292.76 and awarded permanent partial disability benefits based on forty percent (40%) to the body as a whole and temporary total disability benefits for twenty-six (26) weeks. The trial court allowed the employer a credit in the sum of \$3,361.80 for overpaid temporary total disability benefits. Appellate review is de novo upon the record of the trial court, accompanied by a presumption of correctness of the findings of fact, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. section 50-6-225(e)(2). Conclusions of law are reviewed de novo without any presumption of correctness. Wingert v. Government of Sumner County, 908 S.W.2d 921 (Tenn. 1995).

(1)

Disability benefits are computed on a weekly basis and, subject to maximum and minimum amounts fixed by Tenn. Code Ann. section 50-6-207, are based on a percentage of the employee's average weekly wages, or the earnings of the injured employee in the employment in which he was working at the time of the injury during the fifty-two weeks immediately preceding the date of the injury, divided by fifty-two. Tenn. Code Ann. section 50-6-102(a)(1)(A). Earnings, for the purpose of computing an injured employee's average weekly wage, include anything received by the employee under the terms of his employment contract from which he realizes economic gain. P. & L. Construction Company v. Lankford, 559 S.W.2d 793 (Tenn. 1978).

The claimant's compensation includes an hourly wage for seventy hours a month plus a per diem of one dollar (\$1.00) per hour for each hour of overnight travel. There is conflicting testimony as to whether the claimant realizes an economic gain from the per diem. Taxes are apparently not withheld from it and the claimant does not report it as income to Internal Revenue Service. Notwithstanding that, the claimant insisted to the trial court that it did indeed amount to economic gain. The employer's payroll records reflect claimant's total wages, not including the per diem, to be \$10,550.19 for the fifty-two weeks immediately preceding the injury. The employer offered proof that the per diem is intended as an expense reimbursement and, on cross-examination, the claimant agreed.

From our independent examination of the evidence, the panel finds the evidence to preponderate against the trial court's finding and in favor of a finding of an average weekly wage of \$202.89 (\$10,550.19 divided by 52). The judgment is modified accordingly and the employee's compensation rate is consequently reduced to \$135.26 per week (66 2/3% times \$202.89).

(2) and (3)

For injuries occurring on or after August 1, 1992, in cases where an injured worker is entitled to permanent partial disability benefits to the body as a whole, as is the case here, and the pre-injury employer returns the employee to employment at a wage equal to or greater than the wage the employee was receiving at the time of the injury, the maximum permanent partial disability award that the employee may receive is two and one-half times the medical impairment rating. Tenn. Code Ann. section 50-6-241(a)(1).

If the offer from the employer is not reasonable in light of the circumstances of the employee's physical disability to perform the offered employment, then the offer of employment is not meaningful and the injured employee may receive disability benefits up to six times the medical impairment. Newton v. Scott Health Care, 914 S.W.2d 884 (Tenn. 1995). On the other hand, an employee will be limited to disability benefits of not more than two and one-half times the medical impairment if his refusal to return to offered work is unreasonable. Id.

Ms. Gaines was totally disabled for a period of twenty-six weeks following her injury, then returned to work but was forced to quit because of severe pain, on the advice of her treating physician. She was not offered a different position until a few days before the trial. Under such circumstances, the panel finds her return to work after twenty-six weeks was not meaningful and her rejection of the eve of trial offer was not unreasonable. The two and one-half multiplier is inapplicable.

In making determinations as to the extent of a claimant's disability, the courts are to consider all pertinent factors, including lay and expert

testimony, the employee's age, education, skills and training, local job opportunities for the disabled, and capacity to work at types of employment available in the claimant's disabled condition, as well as anatomical impairment. Tenn. Code Ann. section 50-6-241(a)(1). Ms. Gaines is fifty-nine years old and has some college but no degree.

She has a total permanent impairment of ten percent to the body as a whole from the uncontradicted medical proof, including five percent to her back and an additional five percent for hypertension which her family physician testified had its origin in the work-related accident. The employer offered no countervailing medical evidence.

From a deliberate consideration of all the circumstances, the panel finds that the evidence fails to preponderate against the trial court's award of permanent partial disability benefits based on forty percent to the body as a whole. The award is affirmed.

(4)

For her period of temporary total disability, the claimant received disability benefits totaling \$3,361.80 more than the amount to which she was entitled, according to a document admitted in evidence over the claimant's hearsay objection. We find no error by the trial judge in admitting the document. The credit for overpaid temporary total disability benefits is accordingly affirmed.

(5)

When it appears that an appeal in a workers' compensation case is frivolous or taken solely for the purpose of delay, the reviewing tribunal may, upon motion of either party or on its own initiative, award damages against the appellant and in favor of the appellee without remand, for a liquidated amount. Tenn. Code Ann. section 50-6-225(i). This does not appear to be a proper case for such an award.

As modified with respect to the claimant's compensation rate, the judgment of the trial court is affirmed. Costs to be paid by Defendant/Appellant.

---

Joe C. Loser, Jr., Special Judge

CONCUR:

---

Adolpho A. Birch, Jr., Chief Justice

---

Robert S. Brandt, Special Judge

IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

**FILED**

August 28, 1997

Cecil W. Crowson  
Appellate Court Clerk

CAMILLE GAINES,	}	DAVIDSON CIRCUIT
	}	No. 94C-97
Plaintiff/Appellee	}	Below
	}	
vs.	}	Hon. Thomas W. Brothers,
	}	Judge
	}	
AMERICAN AIRLINES,	}	No. 01S01-9701-CV-00015
	}	
Defendant/Appellant	}	AFFIRMED AS MODIFIED.

JUDGMENT ORDER

*This case is before the Court upon the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's Memorandum Opinion setting forth its findings of fact and conclusions of law, which are incorporated herein by reference.*

*Whereupon, it appears to the Court that the Memorandum Opinion of the Panel should be accepted and approved; and*

*It is, therefore, ordered that the Panel's findings of fact and conclusions of law are adopted and affirmed, and the decision of the Panel is made the judgment of the Court.*

*Costs will be paid by Defendant/Appellant and Surety, for which execution may issue if necessary.*

*IT IS SO ORDERED on August 28, 1997.*

PER CURIAM